APPENDIX A

ORDER TO SHOW CAUSE
(Formal Parts Omitted)

Upon the Affidavit hereto annexed and upon all the records, files and proceedings had and on motion of Barbee & Jacobson, defendant's attorneys;

It Is Ordered, that the above named plaintiff, Family Finance Corporation of Bay View appear before the Honorable Thaddeus J. Pruss, County Judge in and for Milwaukee County, Room 403, in the Courthouse, at 901 North 9th Street, City of Milwaukee, County of Milwaukee, State of Wisconsin, on the 3rd day of January, 1967, at 9:00 o' clock A.M. or as soon thereafter as counsel can be heard to show cause why the garnishment proceedings in the above matter should not be dismissed on the merits for violating defendant's rights under the Wisconsin Constitution, Article 1, Section 9; and further defendant's due process and equal protection rights under the United States Constitution 14th Amendment.

It Is Further Ordered, that a copy of this Order to Show Cause, together with a copy of the Affidavit hereto annexed, be served upon the above named plaintiff at least 48 hours prior to the time set for hearing herein.

Dated at Milwaukee, Wisconsin, this 20rd day of December, 1966.

/s/ T. J. Pruss
County Judge

AFFIDAVIT OF THOMAS M. JACOBSON

State of Wisconsin,
County of Milwaukee, ss.:

Thomas M. Jacobson, being first duly sworn on oath deposes and says:

1. That on the 21st day of November, 1966 the plaintiff commenced an original action and garnishment proceedings against the defendant herein;

2. That plaintiff as a result of said garnishment action against defendant is responsible for the garnishee defendant in said matter holding $31.59 due defendant for wages;

3. That plaintiff has not legally established that defendant in fact owes plaintiff any amount of money nor reduced said claim to a valid judgment.

That the defendant's attorney makes this affidavit for the purpose of obtaining an Order directing the plaintiff to show cause why the garnishment action in the instant proceedings should not be dismissed for being in violation of defendant's constitutional rights under the Wisconsin Constitution, Article 1, Section 9 and the United States Constitution, 14th Amendment in that defendant is being deprived of her property without due process of law and further Wisconsin Statutes Chapter 267 permitting garnishment before judgment of a wage earner's salary treats said class unequally in comparison to other individuals similarly situated; that for said reason your Affiant asks the Court to declare Wisconsin's garnishment law before

judgment, more particularly Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 unconstitutional for the aforesaid reasons.

/s/ Thomas M. Jacobson
Thomas M. Jacobson

ORDER OF COUNTY COURT
(Formal Parts Omitted)

Wherefore an Order to Show Cause returnable before the Honorable Thaddeus J. Pruss of the County Court requiring the plaintiff to show cause why the garnishment proceedings in the above matter should not be dismissed on the merits for violating the defendant's rights under the Wisconsin Constitution, Article 1, Section 9 and further defendant's due process and equal protection rights under the United States Constitution 14th Amendment was signed by the Honorable Thaddeus J. Pruss December 23, 1966;

Wherefore Affidavit of defendant's counsel attached thereto indicated plaintiff commenced an original action and garnishment proceeding against defendant herein and pursuant thereto the garnishee defendant held $31.59 due defendant for wages;

Wherefore Affidavit of defendant's counsel attached thereto further indicated plaintiff had not legally established that defendant in fact owed plaintiff any amount of money nor reduced said claim to a valid judgment therefore defendant attorney's affidavit requested the Court to Order the plaintiff to show cause why the garnishment action in the instant proceedings should not be dismissed for being in violation of defendant's constitutional

rights under the Wisconsin Constitution, Article I, Section 9 and the United States Constitution, 14th Amendment in that defendant is being deprived of her property without due process of law and further Wisconsin's Statutes Chapter 267 permitting garnishment before judgment of a wage earner's salary treats said class unequally in comparison to other individuals similarly situated; that for said reason your Affiant asks the Court to declare Wisconsin's garnishment law before judgment, more particularly Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 unconstitutional, for the aforesaid reasons;

Wherefore a hearing was held pursuant to the Order to Show Cause before the Honorable Thaddeus J. Pruss: January 3, 1967 at 9:00 A.M. in his Courtroom in the Courthouse at Milwaukee, Wisconsin;

Wherefore at said hearing the plaintiff appeared by counsel Sheldon D. Frank and defendant appeared by counsel Thomas M. Jacobson;

Upon all the records, pleadings, and files herein it is

Now Therefore Ordered:

That the garnishment action in the instant proceedings does not violate defendant's constitutional rights under the Wisconsin Constitution, Article I, Section 9 and the United States Constitution 14th Amendment due process and equal protection;

That the said determination is for the legislature and not for the Court;

That Wisconsin's garnishment law before judgment, more particularly Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 is therefore not unconstitutional.

That defendant's attorney requests a stay in the garnishment action for purposes of appeal therefore the Court further Orders that all proceedings in the instant garnishment action be and hereby are temporarily stayed until further Order of this Court.

Dated at Milwaukee, Wisconsin, this 7th day of January, 1967.

/s/ Thaddeus J. Pruss
Thaddeus J. Pruss
County Judge

NOTICE OF APPEAL TO CIRCUIT COURT
(Formal Parts Omitted)

Please Take Notice that the defendant, Christine Sniadach, does hereby appeal to the Circuit Court of Milwaukee County, State of Wisconsin from the order made herein on the 6th day of January, 1967, by the Honorable Thaddeus J. Pruss, County Court Judge, which Order refused to dismiss the garnishment action herein on the basis the Wisconsin garnishment before judgment laws; to-wit, Sections 267.02 (1) (a) 1., 267.05 (1), and 267.07 (1) Wis. Stats. 1965 did not deprive defendant of her constitutional rights under the Wisconsin Constitution, Article 1, Section 9,

and the United States Constitution 14th Amendment due process and equal protection.

Dated at Milwaukee, Wisconsin this 9th day of January, 1967.

/s/ Thomas M. Jacobson
Barbee & Jacobson
Martin R. Stein

Defendant's Attorneys

ORDER OF CIRCUIT COURT
(Formal Parts Omitted)

The appeal in this action having been brought before the Honorable George D. Young, Judge of the Circuit Court in and for Milwaukee County, and pursuant to Stipulation of the parties, judgment rendered after filing of briefs by both parties,

Now Therefore, upon motion of Sheldon D. Frank, attorney for the respondent, Family Finance Corporation of Bay View,

It Is Hereby Ordered:

That the judgment of the Honorable Thaddeus J. Pruss, Judge of the County Court, in favor of said respondent, Family Finance Corporation of Bay View and against the appellant, Christine Sniadach, alias, as rendered and entered on the 3rd day of January, 1967, holding that said action, a garnishment issued before the suit was instituted was constitutional and did not violate the due process and equal protection right of the appellant-defendant, be and same hereby is affirmed.

Dated at Milwaukee, Wisconsin, this 18th day of April, 1967.

/s/ George D. Young
Judge of the Circuit Court

Approved this 4th day of April, 1967
/s/ Thomas M. Jacobson
Thomas M. Jacobson, Attorney for Def.

NOTICE OF APPEAL TO SUPREME COURT
(Formal Parts Omitted)

Please Take Notice that the defendant-appellant, Christine Sniadach, does hereby appeal to the Supreme Court of the State of Wisconsin from the Order entered herein on the 18th day of April, 1967 by the Honorable George D. Young, Circuit Court Judge In and For Milwaukee County Branch Number One thereof, which Order affirmed the judgment of the Honorable Thaddeus J. Pruss, County Judge In and For Milwaukee County, Branch Number Six thereof, said judgment holding Wisconsin's garnishment before judgment statutes constitutional and not in violation of defendant-appellant's equal protection and due process guarantees.

Dated this 18th day of April, 1967.

/s/ Thomas M. Jacobson
Thomas M. Jacobson
Defendant-Appellant's Attorney

To: Sheldon D. Frank, Esq., Plaintiff's Attorney,
135 West Wells Street,
Milwaukee, Wisconsin
Clerk of Circuit Court, Milwaukee
County, Milwaukee, Wisconsin

MEMORANDUM DECISION OF CIRCUIT COURT
(Formal Parts Omitted)

PREFATORY

This is an appeal from Branch 6 of the County Court of Milwaukee County. The plaintiff above named commenced a garnishment action against the defendant and named the Miller Harris Instrument Co. garnishee. Thereafter, the defendant moved the Court below by way of an order to show cause requesting the dismissal of the action upon the ground that the proceeding violated the defendant's rights under Article I, Section 9, of the Wisconsin Constitution and the Fourteenth Amendment to the United States Constitution.

The defendant appears now to have abandoned her contention that there has been a violation of Article I, Section 9, of the Wisconsin Constitution and now contends that the proceeding has violated her rights under Article VII, Section 2, of the Wisconsin Constitution.

MEMORANDUM DECISION

I

Article VII, Section 2, of the Wisconsin Constitution

Section 2 of Article VII provides in part that "The judicial power of this state, both as to matters of law and equity, shall be vested in a Supreme Court, Circuit Courts, Courts of Probate . . ."

The basis for this argument is that Chapter 267 contains a presumption made by the legislature that in all disputes between a creditor and his alleged debtor the creditor will prevail and the debtor must automatically prepare for satisfaction of the creditor's claim through immediate seizure of his property. It is argued that the plaintiff need only file the summons and complaint with the clerk who is then automatically required to issue what purports to be "an order of the County Court," although it commands not merely an appearance but disposes of the property, and that no judge is involved in any way in this process up to this point. This argument concludes that all authority to act in a preliminary dispute involving particular litigants has been withdrawn from the Court and is in effect decided by the legislature.

The foregoing argument does violence to the provisions of Chapter 267, Wis. Stats. It is true that the legislature has afforded a remedy not known to the common law for the protection of creditors. The remedy provided simply requires that the garnishee complaint must allege the existence of one of the grounds for garnishment, the amount of the plaintiff's claim, above all offsets, known to the plaintiff, and that the plaintiff believes the garnishee is indebted to or has property in his possession or under his control belonging to the defendant and that such indebtedness or property is not exempt from execution (Sec. 267.05 (1)).

Chapter 267 further provides that the garnishee summons and complaint shall be served on the principal defendant not later than 10 days after service on the garnishee as provided in Sec. 262.06 (Sec. 267.07). If the answer of the garnishee shows

a debt due the defendant, the garnishee may pay the same or sufficient thereof to cover the claim of the plaintiff, with interest and costs, to the clerk of the court. There is the further provision that the plaintiff may request the garnishee in writing to pay such sum to the clerk, and the garnishee must, within 5 days after receipt of such request, pay the sum to the clerk who then issues his receipt to the garnishee who is thereby released of all liability (Sec. 267.13). However, no trial is had in the garnishment action until the plaintiff has judgment in the principal action, which is dismissed in those cases in which judgment goes for the defendant (Sec. 267.16).

Wisconsin has held that garnishment before execution is a provisional remedy. Mahrle v. Engle, 261 Wis. 485. The Court is unable to find Wisconsin authority that directly rebuts the defendant's attack on Chapter 267 of the statutes, but it has long been held that a state may by appropriate legislation authorize the attachment or garnishment of property within its borders, subject to the limitations of the federal and state constitutions. An attachment or garnishment is not a deprivation of property without due process of law within the meaning of constitutional provisions, inasmuch as there must be an adjudication of the rights of the parties before the property can be subjected to the plaintiff's claim. Sec. 267.16 (1) does that very thing.

So far as the payment into court is concerned, no judicial process seems to be involved. The payment amounts to nothing more than a ministerial act to relieve the garnishee defendant of litigation and the funds come into the possession of the court

in custodia legis, and until adjudication in the main action has occurred nothing more than a temporary deprivation has occurred. That deprivation is of statutory creation in favor of the creditor which was in existence at the time the debt was created. In this connection the language of Byrd v. Rector, 112 W. Va. 192, 81 A.L.R. 1213, 1216, is particularly appropriate:

> "We think the answer to these propositions is that a defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon. Whether the defendant shall be deprived of such property must depend of course upon the plaintiff's subsequent ability to obtain a judgment in personam or in rem on his claim against the defendant. If, after having full opportunity to be heard in defense of such claim, a judgment is rendered thereon against the defendant or his property, there has been no lack of due process. In the meantime there has been no deprivation of property. The attachment, quasi rem in nature, has operated only to detain the property temporarily, to await final judgment on the merits of plaintiff's claim. No constitutional right is impaired. McInnes v. McKay, 127 Me. 110, 141 A. 699. Until such judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp."

The Court does not believe there is any need for a judicial act until the defendant's liability to the plaintiff is before the Court.

II

Deprivation of Property Prior to Notice

Defendant argues that her property can be taken before she receives notice of the garnishment proceeding. This, of course, is based on the provisions set forth in Sec. 267.07 (1) which provide for service of a copy of the garnishee summons and complaint or a notice of such service be served not later than 10 days after service on the garnishee. It is argued that the garnishee defendant cannot only withhold defendant's wages but can file an answer asserting that he owes wages to the defendant and simultaneously pay a substantial portion of those wages to the clerk before any notice of the proceeding is given to the defendant. The argument concludes by stating that the defendant is given inadequate notice because such notice as he gets comes after the purpose of the garnishment is a fully accomplished fact. This is an erroneous view of the process.

The timeliness of the notice is truly the basis of the defendant's lament. The important fact, however, is that the defendant does have notice even though it may be given after his property is in custodia legis. Defendant's argument rejects the fact that nothing has happened to the defendant's title except it is temporarily in suspension pending a final adjudication on the debt owed the plaintiff. The argument would deprive the garnishee defendant of a means whereby involvement in litigation might be terminated in order that a defendant

who contracted a debt with the provisional remedy in existence may have the use of his property.

Whether a debtor should be relieved of garnishment while an action for debt is pending is one involving legislative or public policy. When the legislative purpose has been declared in unmistakable language, it is not within the province of the Court to interpose contrary views of what the public need demands. Wait v. Pierce, 191 Wis. 202. And the courts have nothing to do with the policy of laws, their only duty is to interpret the laws as enacted by the legislature. Waldum v. Lake Superior T. & T. R. Co., 169 Wis. 137.

III

No Hearing Before Deprivation of Property

The thrust of the defendant's argument on this point is that she is not afforded the right to challenge the withholding of her wages prior to judgment in the main action and that she loses her property solely upon the service of summons and verified complaint in the garnishment action. This argument amounts to a paraphrasing of the second argument. Since the provisional remedy is constitutionally allowable a legitimate basis for garnishment exists. The argument that defendant is afforded no challenge to the withholding of her wages is ad hominem. If the main action falls, so then does the garnishment and no property belonging to the defendant is lost.

The debt was contracted with the provisional remedy in existence and became part of the contract. To deprive the plaintiff of that remedy would be an impairment of contract and constitutionally bad.

Defendant further argues that the main action involves a promissory note and since plaintiff's attorney is not personally privy to all the facts he should not be allowed to verify the complaint and the plaintiff should be required to personally verify the complaint. Just how this invades the defendant's constitutional rights is not made clear. Certainly the defendant has adequate statutory remedies, both investigative and procedural, which furnish an adequate basis for the protection of her rights.

IV

Violation of Due Process Because Lack of Notice Is Not Conditioned On Need For Summary Process

Defendant argues that absent a claim that a defendant is about to leave the employ of the garnishee, or is about to flee the state entirely, the employee's wages are a continuing asset against which the plaintiff can proceed even after judgment; that such an exercise of jurisdiction is normally authorized only where jurisdiction may not be established in any other manner or the defendant is taking steps which may frustrate the plaintiff's judgment.

It is supposed that garnishment was a legislative incentive for the extension of credit. A means whereby a seller might protect himself against persons not well known to him. Whatever the purpose, the legislature provided the remedy, and the defendant contracted her debt with the right of garnishment on the plaintiff's side. Defendant's argument begs the very reason for the statute. Whether the reason for the statute still exists or has ceased to exist is a matter for legislative determination.

V

Unconstitutional Interference With Appellant's Right To Gainful Employment--Violation of the Fourteenth Amendment to the United States Constitution

Defendant cites Slaughter-House Cases, 16 Wall. 36 (1873), as authority for the proposition that the right to pursue a gainful employment unimpeded by arbitrary state interference is a liberty preserved under the due process clause of the Fourteenth Amendment to the United States Constitution. Defendant goes on to argue that Chapter 267, Wis. Stats., deprives defendant of income earned without any demonstration that there is a need for such deprivation. Further, that persons of low income cannot post the bond in the amount of one and one-half times the sum in dispute and that, therefore, this remedy is illusory; that the deprivation of income is the most direct interference with the employment relationship, and that garnishment may cause an employee to be discharged by an employer.

Again, whether a creditor should be deprived of the provisional remedy in the case of a poor person is a matter for legislative determination. As matters now stand, the remedy does not exist until credit has been extended. If the remedy is drastic, it behooves the defendant to refrain from contracting debts beyond her ability to pay. Certainly this Court is without authority in law to override the legislative policy declared in Chapter 267, Wis. Stats. There is nothing arbitrary about establishing a provisional remedy in connection with the process of collecting a debt. Whether a need for that remedy exists is for the legislature to determine.

VI

Denial of Equal Protection of Law

Defendant argues that Chapter 267 deprives the defendant of equal protection of law in violation of the Fourteenth Amendment to the United States Constitution because it permits illegal discrimination between persons in similar circumstances. This argument is based upon the proposition that Sec. 267.22, Wis. Stats., permits garnishment of salaries and wages of public officers and employees after judgment only.

Chapter 267 does treat public employees different than members of the public at large as stated by the defendant. It has been held that this is a proper classification. 4 O.A.G. 783. The Court agrees with that opinion. The continuity of the public business may very well be the reason why garnishment may not lie against a public employee until after judgment. That reason may lend support to the defendant's previous argument concerning interference with her employment but it does not destroy the reason for the classification. The validity of differentiating between public and private employees effectively destroys defendant's argument in this respect.

CONCLUSION

The judgment of the County Court of Milwaukee County must be affirmed, and plaintiff's counsel will accordingly prepare an appropriate order for judgment, submit the same to counsel for the defendant for approval as to form, and thereafter offer the same for signing and entry.

Dated at Milwaukee, Wisconsin, this 15th day of March, 1967.

BY THE COURT:

/s/ George D. Young
Circuit Judge

OPINION OF SUPREME COURT OF WISCONSIN

And afterwards, to-wit on the 8th day of December, A. D. 1967, the same being the 61st day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

FAMILY FINANCE CORP. OF BAY VIEW,
Respondent,

-v.-

CHRISTINE SNIADACH, ALIAS,
Appellant,

MILLER HARRIS INSTRUMENT CO.,
Garnishee Defendant.

Opinion by Chief Justice Currie

This cause came on to be heard on appeal from the judgment of the Circuit Court for Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit Court for Milwaukee County herein be, and the same is hereby affirmed. (Justices Heffernan and Wilkie dissent. Opinion filed.)

No. 64

August Term, 1967

STATE OF WISCONSIN--IN SUPREME COURT

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

-v.-

CHRISTINE SNIADACH, ALIAS,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

Appeal from an order of the circuit court for Milwaukee County: GEORGE D. YOUNG, Circuit Judge. Affirmed.

Plaintiff finance corporation instituted a garnishment action in the county court of Milwaukee County naming Christine Sniadach as defendant and

Miller Harris Instrument Co. as garnishee. Both defendant and garnishee were served with copies of the verified garnishee complaint and the garnishee summons on November 21, 1966.

The garnishee complaint alleged that: a summons had been issued in an action by plaintiff finance corporation against defendant; judgment had not yet been entered; the action was one to recover damages upon a promissory note; and the amount of plaintiff's claim against defendant was $420 above all offsets. On November 30, 1966, the garnishee filed its answer in which it stated it had wages of $63.18 in its control belonging to defendant, and that it would pay one half thereof to defendant as a subsistence allowance and hold the other half subject to the further order of the court.

On December 23, 1966, defendant served on plaintiff's counsel and filed an order requiring plaintiff to show cause why the garnishment proceedings should not be dismissed for violating defendant's rights under Art. I, Sec. 9 of the Wisconsin Constitution, and under the due process and equal protection clauses of the United States Constitution. A hearing was held on January 3, 1967, and on January 7, 1967, the county court, Thaddeus J. Pruss, Judge, presiding, entered its order upholding the constitutionality of Wisconsin's garnishment before judgment statutes, secs. 267.02 (1) (a) 1, 267.05 (1), and 267.07 (1), Stats.

Defendant then appealed from this order to the circuit court. On April 18, 1967, the circuit court affirmed the county court's order, and defendant has appealed from the circuit court's order.

Currie, C. J. Appellant attacks the constitutionality of Wisconsin's garnishment before judgment statutes, secs. 267.02 (1) (a) 1, 267.05 (1), 267.07 (1), 267.16 (1), 267.18 (2), and 267.21, Stats., on a number of grounds based on injustices and deprivations which have been, or are likely to be, suffered by others, but which she has not personally experienced.

One such ground is that poor wage earners may have their wages garnished in a situation where there is no merit to the claim for which the principal action has been instituted. As a result such wage earners either are forced to settle with the plaintiff by assigning future wages, or are deprived of their wages for a long period of time until the principal action can be tried and probable cause determined. Here, appellant's indebtedness is on a note, and her affidavit in support of the order to show cause contains no allegation that she is not indebted thereon to plaintiff.

Another alleged ground of unconstitutionality is that sec. 267.18 (2) (a), Stats.,[1] makes no accommodation for defendants with more than one dependent.

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[1] Sec. 267.18 (2) (a), Stats., provides: "When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50% of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action."

However, appellant received the benefit of the maximum subsistence allowance of one half of the amount of her garnished wages, and her affidavit does not allege how many dependents, if any, she has.

Another alleged ground of unconstitutionality is that sec. 267.21, Stats., which permits a defendant to post a bond and secure the release of his garnished property, denies equal protection of the laws to persons of low income. Appellant has made no showing that she is a person of low income and unable to post a bond.

A further alleged ground of unconstitutionality is that the garnishment before judgment statutes threaten the gainful employment of many wage earners. It is claimed that many employers discharge garnished employees for being unreliable. Appellant, however, has made no showing that her own employer reacted in this manner.

Still a further ground of attack is the provision in sec. 267.07 (1), Stats., which affords ten days' time to plaintiff to serve the garnishee summons and complaint on defendant after service of same on the garnishee. Here, appellant was served on the same day as the garnishee.

It is a long-accepted rule that a party may not urge the unconstitutionality of a statute upon a point not affecting his or her rights.[2] In State ex rel. Kellogg v. Currens,[3] the challenging party presented 11 grounds of attack upon the constitutionality of a statute. The court discussed the one which affected the challenger but refused to discuss the other ten, stating:

> ". . . Statutes are not to be declared unconstitutional at the suit of one who is not a sufferer from their unconstitutional provisions . . . We cannot set aside the acts of the legislature at the suit of one who, suffering no wrong himself, merely assumes to champion the wrongs of others . . . ."[4]

Accordingly we will confine our consideration of appellant's grounds of attack upon the garnishment before judgment statutes to those directly affecting her. The grounds of attack which will thus be considered are:

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[2] Scharping v. Johnson (1966), 32 Wis. 2d 383, 395, 145 N.W. 2d 691; Joint School Dist. v. Boyd (1955), 270 Wis. 222, 226, 70 N.W. 2d 630; Milwaukee Boston Store Co. v. Amer. Fed. of H. W. (1955), 269 Wis. 338, 357, 69 N.W. 2d 762; Anderson v. State (1936), 221 Wis. 78, 89, 265 N.W. 210; State ex rel. Kellogg v. Currens (1901), 111 Wis. 431, 87 N.W 561; 16 C.J.S., Constitutional Law, p. 226, sec. 76(a).

[3] Supra, footnote 2.

[4] Id. at pp. 442-443.

(1) These statutes deprive appellant of her property without due process of law.

(2) Appellant is denied due process of law, because the statutes afford her no right to an immediate hearing to challenge the validity of the garnishment.

(3) The legislature has assumed judicial powers in violation of art. VII, sec. 2, Wis. Const.

(4) The garnishment before judgment statutes deny appellant equal protection of the laws because they subject wage earners to harsher summary process than other classes of debtors.

Deprivation of Property Without Due Process.

The garnishment before judgment proceedings do not involve any final determination of the title to a defendant's property, but merely preserve the status quo thereof pending determination of the principal action. The defendant receives notice and a hearing before being permanently deprived of his or her property.

In McInnes v. McKay[5] it was contended that Maine's statute, which permitted attachment, without affidavit or bond, in advance of judgment, deprived the defendant of due process of law contrary to the fourteenth amendment of the United States Constitution. The relevant statute provided:

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[5] (1928), 127 Me. 110, 141 Atl. 699.

"All civil actions, except scire facias and other special writs shall be commenced by original writs; which, in the Supreme Judicial Court, may be issued by the clerk in term time or vacation, and framed to attach the goods and estate of the defendant, and for want thereof to take the body, or as an original summons, without an order to attach goods and estate."[6]

The court held that this was

". . .not a deprivation without 'due process of law' for it is part of a process, which during its proceeding gives notice and opportunity for hearing and judgment of some judicial or other authorized tribunal."[7]

It noted that the attachment merely created a temporary lien, which did not destroy the defendant's title. The court also cited the United States Supreme Court's statement in Rothschild v. Knight[8] that to what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide.

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[6]Maine Rev. Stats. 1928, ch. 86, sec. 2.

[7]Supra, footnote 5, at p. 116.

[8](1902), 184 U.S. 334, 341, 22 Sup. Ct. 391, 46 L. Ed. 573.

McInnes v. McKay was affirmed by the United States Supreme Court in a per curiam decision[9] on the authority of Ownbey v. Morgan[10] and Coffin Brothers v. Bennett.[11]

Ownbey v. Morgan upheld the constitutionality of Delaware's foreign attachment law as not being a denial of due process even though it harshly provided that before the defendant could appear and defend he had to give security in the amount of the value of the property attached. The court in its opinion declared:

> "The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings . . . ."[12]

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[9](1928), 279 U.S. 820, 49 Sup. Ct. 344, 73 L. Ed. 975.

[10](1921), 256 U.S. 94, 41 Sup. Ct. 433, 65 L. Ed. 837.

[11](1928), 277 U.S. 29, 48 Sup. Ct. 422, 72 L. Ed. 768.

[12]Supra, footnote 10, at pp. 110-111.

Coffin Brothers v. Bennett involved a Georgia statute which authorized the superintendent of banks to issue an execution against the property of a stockholder of a defunct bank upon whom a stock assessment had been levied. Mr. Justice Holmes wrote the unanimous opinion for the Court and stated:

> "The objection urged by the plaintiffs in error seems to be that this section purports to authorize an execution and the creation of a lien at the beginning, before and without any judicial proceeding. But the stockholders are allowed to raise and try every possible defense by an affidavit of illegality, which, as said by the Supreme Court of Georgia, makes the so called execution 'a mode only of commencing against them suits to enforce their statutory liability to depositors.' A reasonable opportunity to be heard and to present the defence is given and if a defence is presented the execution is the result of a trial in Court. The Fourteenth Amendment is not concerned with the form. Missouri ex rel. Hurwitz v. North, 271 U.S. 40, 42. The fact that the execution is issued in the first instance by an agent of the State but not from a Court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection . . . ."[13]

While neither Ownbey v. Morgan nor Coffin Brothers v. Bennett involved garnishment before

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[13] Supra, footnote 11, at p. 31.

judgment statutes, their rationale, when cited by the United States Supreme Court as authority for affirming McInnes v. McKay becomes clear. It is that the creditor's remedies involved, though harsh, did not deprive a man of his property without notice and an opportunity to be heard.

The ability to place a lien upon a man's property, such as to temporarily deprive him of its beneficial use, without any judicial determination of probable cause dates back not only to medieval England but also to Roman times.[14] In regard to the constitutional relevance of antiquity, Mr. Justice Holmes has stated:

> "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by Ownbey v. Morgan, 256 U.S. 94, 104, 112."[15]

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[14] 1 Wade on Attachment (1886), pp. 19-22, sec. 1.

[15] Jackman v. Rosenbaum Co. (1922), 260 U.S. 22, 31, 43 Sup. Ct. 9, 67 L. Ed. 107. See also Frank v. Maryland (1959), 359 U.S. 360, 370, 79 Sup. Ct. 804, 3 L. Ed. 2d 877, in which Mr. Justice Frankfurter cites Jackman and Ownbey as to the legal significance of a long and consistent history of state practice.

We deem a West Virginia decision, which dealt with a before judgment garnishment, to be apposite. In Byrd v. Rector[16] the nonresident defendant, who had been garnished before judgment, argued that he had been denied due process because the plaintiff had not been required to post a bond before the garnishment. The court stated:

> "We think the answer to these propositions is that a defendant is not deprived of his property by reason of the levy of a copy of the attachment upon a person who is indebted to him or who has effects in his custody belonging to the defendant. The most that such procedure does is to deprive defendant of the possession of his property temporarily by establishing a lien thereon. Whether the defendant shall be deprived of such property must depend of course upon the plaintiff's subsequent ability to obtain a judgment in personam or in rem on his claim against the defendant. If, after having full opportunity to be heard in defense of such claim, a judgment is rendered thereon against the defendant or his property, there has been no lack of due process. In the meantime there has been no deprivation of property. The attachment, quasi rem in nature, has operated only to detain the property temporarily, to await final judgment on the merit's [sic]of plaintiff's claim. No constitutional right is impaired. McInnes v. McKay, (Me.) 141 Atl. 699. Until such judgment is obtained, the defendant's property in the hands of a garnishee is immune from the plaintiff's grasp. Under no circumstances

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[16](1932), 112 W. Va. 192, 163 S.E. 845.

could it be converted into cash and applied on the plaintiff's demand prior to final adjudication of the merits of the controversy between plaintiff and defendant. Now, if pending such determination, the defendant is inconvenienced because he is temporarily deprived of the possession and use of his property in the hands of the garnishee, the defendant may acquire possession by giving bond, for which provision is made by Official Code, 38-7-20. We find no error under this point."[17]

In view of the aforecited authorities, we determine that Wisconsin's garnishment before judgment statutes do not deprive appellant of her property without due process of law.

Failure of Garnishment Statutes to Afford Appellant an Immediate Hearing

Sec. 267.16 (1), Stats., provides:

"No trial shall be had of the garnishment action until the plaintiff has judgment in the principal action and if the defendant has judgment the garnishment action shall be dismissed with costs."

Appellant contends that the failure of the garnishment statutes to afford her an immediate hearing on the propriety of the garnishment constitutes a denial of due process.

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[17] Id. at p. 198. See also 16 Am. Jur. 2d, Constitutional Law, p. 980, sec. 576.

However, despite the fact that the garnishment statutes do not grant to appellant the right of judicial review of the propriety of the garnishment action prior to trial of the principal action, Wisconsin case law establishes that she can obtain such judicial review.

In Orton v. Noonan[18] the court stated in regard to garnishment before judgment:

> ". . . the court, without the aid of any express statutory provision, has a general power to control and regulate the proceeding upon summary process of this nature, so as to correct or prevent any abuse or misuse of such process, and that the defendant may, in some proper form, contest the truth of the grounds alleged by the plaintiff for obtaining it."[19]

Thus the court's power to control its process is inherent and requires no statutory authorization.

This court in Chernin v. International Oil Co.[20] reaffirmed the right of a defendant to move to quash or dismiss the garnishment action to the point of a judicial ascertainment that a good-faith controversy exists. The procedure approved therein was a motion for summary judgment dismissing the garnishment action on the ground that the complaint in the

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[18](1871), 27 Wis. 572.

[19]Id. at p. 579.

[20](1952), 261 Wis. 308, 52 N.W. 2d 785.

principal action failed to state a cause of action "for damages founded upon contract" as required by then sec. 267.01 (3), Stats. Such requirement is now to be found in present sec. 267.02 (a).

Thus potential abuses of garnishment before judgment are subject to judicial review before trial of the principal action. Moreover, a garnishment without probable cause can be the basis of a suit for malicious prosecution.[21] We, therefore, find no denial of due process in the failure of the garnishment statutes to contain a provision for judicial review of the propriety of a garnishment action prior to trial of the principal action, inasmuch as such right exists independently of statute.

Assumption of Judicial Powers

Sec. 267.04, Stats., provides in part as follows:

"(1) Upon payment to the clerk of court of a clerk's fee of $2 and a suit tax of $1, the clerk shall issue a garnishee summons . . .

"(2) The garnishee summons shall be substantially in the following form:

". . .

"You are ordered to retain such property [belonging to the defendant] and make no payment, except for subsistence allowance if any, to the principal defendant pending the further order of the court.

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[21] Novick v. Becker (1958), 4 Wis. 2d 432, 90 N.W. 2d 620.

". . .

"(3) A garnishment action shall be commenced by the service of a garnishee summons and annexed verified complaint."

In regard to the complaint, sec. 267.05 (1), Stats., provides:

"The garnishee complaint in a garnishment action before judgment must allege the existence of one of the grounds for garnishment mentioned in s. 268.02 (1) (a), the amount of the plaintiff's claim against the defendant, above all offsets, known to the plaintiff, and that plaintiff believes that the named garnishee is indebted to or has property in his possession or under his control belonging to the defendant (naming him) and that such indebtedness or property is, to the best of plaintiff's knowledge and belief, not exempt from execution."

The plaintiff must file with or mail to the clerk of court a copy of both the garnishee summons and complaint before serving the garnishee-defendant.[22] We deem a more accurate statement of appellant's position to be that the legislature has attempted to unconstitutionally vest judicial powers in an administrative officer.

This court in 1927 in State v. Van Brocklin[23] upheld the constitutionality of a state statute which

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[22] Sec. 267.10, Stats.

[23] (1927), 194 Wis. 441, 217 N.W. 277.

conferred power on a clerk of court to issue a search warrant upon determining probable cause against the contention that this violated art. VII, sec. 2, Wis. Const. The court quoted with approval from the Alabama case of Kreulhaus v. Birmingham[24] as follows:

> "'. . .it was not the intention of the framers of the Constitution to deny to the Legislature the power to confide to ministerial officers, who do not constitute a part of the judiciary, properly so called, many duties involving inquiries in their nature judicial.'"[25]

While some members of this court question some of the reasoning employed by the court to reach the result in State v. Van Brocklin, we approve of the holding that some duties involving inquiries judicial in their nature may be delegated to administrative officers where the acts of such officers are later subject to judicial review.

In Central Loan & Trust Co. v. Campbell[26] the United States Supreme Court considered the argument that a territorial statute of Oklahoma was void, because it allowed a probate judge to issue a writ of attachment, while the organic act of the territory vested all common law jurisdiction in the Supreme Court and District Courts of Oklahoma. The court rejected this argument, and stated:

[24](1909), 164 Ala. 623, 51 So. 297.

[25]Id. at p. 629.

[26](1899), 173 U.S. 84, 19 Sup. Ct. 346, 43 L. Ed. 623.

"On the face of the Oklahoma statute it is apparent that it is required as a prerequisite to the issuance of an attachment that the affidavit, in support thereof, shall simply state the particular ground for attachment mentioned in the act, and therefore that the granting of an order for attachment does not involve the discharge of a judicial function, but merely the performance of a ministerial duty, that is, the comparison of the language of the affidavit with the terms of the statute . . . It is elementary that where the ground of attachment may be alleged in the language of the statute, the authority to allow the writ need not be exercised by the judge of the court, but may be delegated by the legislature to an official, such as the clerk of the court."[27]

As appears from the prior quotation herein from Coffin Brothers v. Bennett,[28] the United States Supreme Court also found unobjectionable the fact that the execution had been issued by the state superintendent of banks instead of a court. However, the court was there concerned with the due process clause of the fourteenth amendment rather than the issue of unconstitutional delegation of judicial power contrary to a state constitution.

We find no merit to appellant's contention that sec. 267.04, Stats., violates art. VII, sec. 2, Wis. Const.

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[27] Id. at pp. 95-96.

[28] Supra, footnote 11.

Denial of Equal Protection of the Laws

Appellant's brief asserts that the garnishment before judgment statutes subject wage earners to harsher summary process than other classes of debtors. However, any debtor, wage earner or not, is subject to these statutes. For example, bank accounts of businessmen and corporations are subject to garnishment before judgment. It may be argued generally that the effect of garnishment before judgment is harsher on wage earners than other classes of debtors. However, appellant has not set forth how these statutes, as applied to her own particular situation, have denied her equal protection of the laws. We decline to consider this argument of denial of equal protection in the absence of facts substantiating such contention.

Pending Legislation

This court is fully cognizant of the fact that many undue hardships have resulted from the operation of Wisconsin's before judgment garnishment statutes in the cases where wages and salaries of employees have been garnished. We are pleased that there is pending before the present legislature legislation that will remedy these abuses.

On November 14, 1967, the assembly passed by a vote of 89 to 5 Substitute Amendment 1, to Bill No. 454, which bars garnishment before judgment of the wages or salary of the principal defendant. The State Senate now has this measure before it.

By the Court. ---Order affirmed.

DISSENTING OPINION OF SUPREME COURT OF WISCONSIN

(Filed December 8, 1967)

STATE OF WISCONSIN

In Supreme Court

August Term, 1967

No. 64

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

-v.-

CHRISTINE SNIADACH, alias,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

Heffernan, J. (dissenting) The majority opinion would lead one to believe that garnishment before judgment is a venerable practice of Anglo-Saxon jurisprudence and should be accorded the imprimatur of time. Yet, the fact of the matter is that this is a rather new development in Wisconsin law. The excellent brochure written by Paul L. Moskowitz for the Wisconsin Extension Law Department states:

"Chapter 267 of the Wisconsin Statutes (1959) comes from R.S. 1878, Section 2752.

The statute in Wisconsin originally provided garnishment as a remedy in aid of execution only. Many states still follow this law." 1962 Wisconsin Lawyers' Seminars, Wisconsin Garnishment and Exemptions, p. 1.

Garnishment is strictly a statutory remedy. Markman v. Becker (1959), 6 Wis. 2d 438, 95 N. W. 2d 233. Thus, it is apparent that it is no great sacred bastion of the common law that is under assault in this case. The only question is whether legislative action has deprived the defendant and others similarly situated of their constitutional rights.

The majority concludes that the garnishment statute does not result in a deprivation of property. The rationale behind this is embodied in the majority's quotation from Byrd v. Rector (1932), 112 W. Va. 192, 163 S.E. 845. The essence of that quotation is that there is no deprivation of the defendant's property because the procedure places the defendant's property in the hands of the law and not in the hands of the plaintiff until after judgment.

It strikes me that this reasoning is most unrealistic. The constitutional question is not whether defendant has lost his title to the property, nor whether another has gained its beneficial use. The test is whether he was deprived of his property. In the instant case no legal fiction can disguise the fact that, from the time of the service of the garnishee summons until the lien of that process is released, the defendant is unable to make any beneficial use of his wages other than the pittance which may be available to him either as an exemption or subsistence allowance. Moreover, the case of Byrd

v. Rector is only of strained applicability in the present case. In that case an infant plaintiff, who had been injured by the explosion of a dynamite cap which had been negligently disposed of by a nonresident defendant, commenced a suit in tort for his personal injury. Accordingly, an attachment was issued on the ground that the defendant was a nonresident. The Byrd Case furnishes a sound rationale in support of our attachment laws, and were the plaintiff's attack on the attachment procedures, ch. 266 of the Wisconsin statutes, the citation would be more appropriate. Chapter 266 recognizes that attachment is an unusual remedy--to be resorted to only in special circumstances. It is designed to protect state residents from creditors whose conduct amounts to fraud or from foreign creditors who have assets within the state. The Byrd Case situation is clearly contemplated by sec. 266.03(2) (a):

> "(2) Tort Action. In tort actions the affidavit shall state that a cause of action in tort exists in favor of the plaintiff and against the defendant, that the damages sustained exceed fifty dollars specifying the amount claimed and either:
>
> "(a) That the defendant is not a resident of this state. . . ."

The case of Ownbey v. Morgan (1921), 256 U.S. 94, 109, 41 Sup. Ct. 433, 65 L. Ed. 837, points out that the attachment of the goods of a foreigner is to be treated uniquely and is dependent in part on the duty of a state to protect its own citizens in their claims against nonresident owners of property situate within the state. The Ownbey Case uses a rather quaint, archaic, and unacceptable rationale

in concluding that there is no denial of due process when a debtor's property is detained, stating:

> "[A] man who has property usually has friends and credit--and hence in its normal operation it must be regarded as a permissible condition; and it cannot be deemed so arbitrary as to render the procedure inconsistent with due process of law . . . ." P. 111.

This same case stressed the origins of the attachment procedure and pointed out that its purpose was to distrain the defendant's property to assure the appearance of the defendant so that there could be a procedure in personam against him. It is clear that Ownbey v. Morgan has little relevance to the Wisconsin law which permits the garnishment of wages of Wisconsin residents.

While McKay v. McInnes (1928), 279 U.S. 820, 49 Sup. Ct. 344, 73 L. Ed. 975, is relied upon by the majority, it appears that the United States Supreme Court without opinion merely affirmed the Maine court on the basis of Ownbey v. Morgan, supra, and Coffin Brothers v. Bennett (1928), 277 U.S. 29, 48 Sup. Ct. 422, 72 L. Ed. 768. As pointed out above, Ownbey is not applicable to this case. The Coffin Brothers opinion is a rather cursory one by Mr. Justice Holmes in which he justifies his conclusion on the basis that it is a "familiar method in Georgia." This is hardly a persuasive rationale; and as pointed out above, it is specious reasoning to conclude that, because a debtor has a chance to be heard on the question of whether or not his property should be returned to him, he has not been deprived of his property in the interim. Moreover, Mr. Justice Holmes points out that the defendants "are allowed to raise and try every possible

defense by an affidavit of illegality." (Emphasis supplied.) The Wisconsin statute provides for no such comprehensive mode of defense available at the inception of the suit.

While some of the reasoning in these cases is appropriate to the garnishment of property, it has little or no relevance to the garnishment of wages. The garnishment of wages is uniquely a product of the accrual bookkeeping system which has only come to fruition in the twentieth century. Until recently, laborers were paid by the day and not by the week or month. Hence, the law of garnishment in terms of historical precedent arose out of the garnishment of property other than wages. There is little pertinence in the majority's statement that the right to place a lien upon a man's property dates back to medieval England and Roman times. Accrued wages, in terms of the history of the law, are a new property right and should be treated by the law with that distinction in mind.

It should also be noted that until recently wages were totally exempt from garnishment. Rood on Garnishment (West's, 1896), sec. 87, page 119, states the policy of the wage exemptions that was nearly universal until near the end of the nineteenth century:

> "The policy of the law--the intent of the legislature in enacting these provisions--is too plain for argument. It was to secure to those who toil with their hands, or depend for their subsistence upon their personal earnings, a sufficient amount of the fruits of their labor to supply them and their families with the necessities of life, and a few of the conveniences of modern civilization, free from the merciless grasp of their less needy creditors."

It was not until the enactment of ch. 141 of the Laws of Wisconsin (1883) that the exemption for wages was in part abandoned. [1]

I would concede that it is not unconstitutional to deprive a defendant of his property, including wages, by garnishment and to hold it in custodia legis for a limited period of time so that the creditor can be certain that the assets are there to satisfy its judgment when once obtained. Under the Wisconsin statutes, however, the plaintiff need not serve his summons on the defendant until ten days after he has served the garnishee. This is a clear denial of due process, for the wages of the defendant are distrained without the necessity of notice to their equitable owner. As the majority opinion clearly points out, however, there is no allegation that this particular denial of justice took place in the instant case. It should be noted, however, that the very case relied upon by the court, Ownbey v. Morgan, supra, page 103, states that, in determining whether there is a denial of due process, the court is not confined to the particular case at hand but is to make its determination " . . . with respect to the general effect and operation of the system of procedure established by the statutes." While Ownbey takes the position that the unusual case of hardship should be overlooked in favor of the general statutory scheme, it is obvious that the converse reasoning is equally applicable.

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[1] An earlier enactment, ch. 317, Laws of Wisconsin (1882), provided for an exemption of all wages for three months prior to the garnishment.

The defendant complains, however, that even though the notice is given simultaneously, i. e., by a concurrent service on both the principal defendant and the garnishee, nevertheless, the property is withheld unconscionably until there has been a trial of the principal action. The majority dismisses this contention by stating that it is in the inherent power of a court to prevent any abuse or misuse of the process and that the defendant may, as said in Orton v. Noonan, infra, "in some proper form" contest the truth of the grounds alleged by the plaintiff.

This court has defined that right to contest the plaintiff's use of process in Chernin v. International Oil Co. (1952), 261 Wis. 308, 52 N.W. 2d 785, and it is apparent that the defendant's rights are in fact limited to the determination of whether a good faith controversy exists. Orton v. Noonan (1871), 27 Wis. 572, quoted by the majority, makes it clear that all the plaintiff has to do to satisfy this requirement is the making and filing of an affidavit of indebtedness to the plaintiff. And Chernin v. International Oil Co. merely determined that where the complaint in the principal action alleges a cause of action for damages for breach of contract the garnishment action will not be dismissed.

Under the state of law as it now stands, unless the plaintiff's complaint is demurrable or on its face fraudulent there is no relief available to the defendant short of the trial of the principal action. There is no statutory or common law procedure whereby the defendant can in a timely or summary fashion "raise . . . every possible defense by an affidavit of illegality," as described in Coffin Brothers v. Bennett, supra. The right to a prompt and

summary defense on the merits that Mr. Justice Holmes found as a saving grace in Coffin is fatally absent in the instant case.

Nor do I consider the possibility of a malicious prosecution action to be much solace to a wage owner who has been oppressed by an improper garnishment procedure action. If he has the resources to commence a retaliatory action for damages, he most likely would have been able to successfully defend himself in a garnishment action. The majority reasoning is similar to that of Ownbey where the United States Supreme Court concluded that the defendant's property would not have been seized if he were not a man of property and, hence, he should be able to take care of himself. The circuity of the court's reasoning is not acceptable to me.

I conclude that a major constitutional defect of the statute is its failure to provide for a mandatory trial on the merits within a limited and statutorily defined time following the seizure of the defendant's wages.

I am in agreement with the majority's point that the issuance of a garnishee summons by the clerk of court does not constitute the usurpation of judicial power. I am, however, in complete disagreement with the rationale by which it arrives at that conclusion. Its conclusion is supported by the reliance on two discredited cases. The first of these is State v. Van Brocklin (1927), 194 Wis. 441, 217 N.W. 277. In this case the question was whether a statute which permitted the clerk of the Winnebago county court to issue a search warrant constituted the proper exercise of judicial power. The court in Van Brocklin found an implied authorization

for such delegation of power in sec. 23, art. VII, of the Constitution, which manifestly was designed to provide for the appointment of court commissioners exercising the power of a judge in chambers. The court concluded that if the legislature had that power it undoubtedly had the residual power to authorize clerks of municipal courts to issue criminal warrants. It is submitted that this hardly follows. At any rate this court has subsequently, in White v. Simpson (1965), 28 Wis. 2d 590, 137 N. W. 2d 391, clearly ruled that only a magistrate exercising judicial power is authorized to issue a warrant, making it clear that the question of probable cause is not to be left to an administrative officer. Giordenello v. United States (1958), 357 U. S. 480, 486, 78 Sup. Ct. 1245, 2 L. Ed. 2d 1503, used the language, "The Commissioner must judge for himself the . . . facts . . . to show probable cause." (Emphasis supplied.) The other case relied upon by the majority, Kreulhaus v. Birmingham (1909), 164 Ala. 623, 51 So. 297, held that the statute that permitted a clerk to issue warrants of arrest did not confer any judicial power. The rationale of the Alabama court was:

> "The statute in this case conferred no power upon the clerk to finally hear and determine, nor even to commit to bail, but only to issue warrants, which must be construed to authorize him to issue warrants on probable cause . . . ." Pp. 629-630.

It is obvious that following the White v. Simpson rationale, this case is equally repugnant to our now accepted standards of due process.

I agree with the court's rationale that the only determination required of the clerk is a ministerial

one, that is, it is only necessary for the plaintiff to set forth in the language of the statute the basis upon which the summons is requested. This is not a determination of probable cause. It is not a judicial function and is not constitutionally prohibited. I object, however, to the majority's failure to rest their position upon this perfectly good argument. Instead they have chosen to shore up this rationale with outworn precedents of extremely dubious authority, and by so doing have put the ruling of White v. Simpson in jeopardy.

In view of my views set forth above, I must respectfully dissent from the court's opinion. I am convinced that the plaintiff has established that she is personally aggrieved to the extent that she may properly raise at least some of the constitutional issues which she presses. Since I find her complaint has validity as set forth above, I would hold the garnishment statute unconstitutional in that it deprives the defendant of property--wages--without due process of law--in that she lacks any method of insuring a reasonably prompt adjudication of her rights and the return of her property. I also dissent because the majority opinion has failed to state adequately what I conceive to be its true position--that the affirmance of the trial court results not from a conviction that the trial court is correct on the constitutional question, but rather on the fact that this particular plaintiff has not been aggrieved. The court was no doubt influenced by the legislative progress of the bill that would end the garnishment of wages prior to judgment. There is an understandable willingness to "let sleeping dogs lie" when there exists the strong possibility that the legislature will shortly correct this harsh and unconstitutional legislation. I believe, however, that this court

would be remiss in its constitutional duties if it did not hold a statute unconstitutional if in fact it appears to be so, even though the legislature is about to fashion a correction. Since I believe the statute to be in part unconstitutional, I would reverse.

I am authorized to state that Mr. Justice Wilkie joins me in this dissent.

MOTION FOR REHEARING DENIED

And afterwards, to-wit on the 27th day of February, A. D. 1968, the same being the 97th day of the August, 1967 Term, the following proceedings were had in said cause in this Court:

FAMILY FINANCE CORP. OF BAY VIEW,

Respondent,

-v.-

CHRISTINE SNIADACH, alias,

Appellant,

MILLER HARRIS INSTRUMENT CO.,

Garnishee Defendant.

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in said cause, it is now here ordered that said motion be, and the same is hereby, denied with costs.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

This case involves the following statutes of the State of Wisconsin:

(a) Wis. Stat. Sec. 267.01 (1967 Pocket Part)

(1) Any creditor may proceed against any person who is indebted to or has any property in his possession or under his control belonging to such creditor's debtor, as prescribed in this chapter. "Plaintiff" as used in this chapter includes a judgment creditor and "defendant", a judgment debtor.

(2) Except as otherwise provided in this chapter, the procedure in garnishment actions shall be the same as in ordinary civil actions.

(2a) A garnishment action is a separate action.

(3) An individual may commence a garnishment action in his own person and in his own behalf, or by an attorney licensed to practice in the courts of this state, but not otherwise. Garnishment actions on behalf of any other party shall be commenced only by attorneys licensed to practice in the courts of this state.

(4) No garnishment action shall be brought to recover the price or value of spirituous, malt, ardent or intoxicating liquors sold at retail.

(b) Wis. Stat. Sec. 267.02 (1967 Pocket Part)

(1) A plaintiff may commence a garnishment action at any time after:

(a) A summons is issued: 1. In an action for damages founded upon contract, express or implied (or in a contract action where a writ of attachment could issue on demands not yet due under s. 266.03(3)). 2. In an action upon a judgment. 3. In a tort action where a writ of attachment could issue under s. 266.03(2).

(b) An execution upon an in personam judgment is issuable.

(2) If wages or salary are the subject of a garnishment action, and payment of wages or salary to the defendant is, has been, or should be, withheld therein, plaintiff may not commence any other garnishment action affecting the wages or salary of the principal defendant prior to judgment in the principal action.

(3) Except as provided in sub. (2), the plaintiff may, in like manner, subsequently proceed against other garnishees, or, if he has reason to believe they have subsequently become liable, against the same garnishee.

(c) Wis. Stat. Sec. 267.05 (1967 Pocket Part)

(1) The garnishee complaint in a garnishment action before judgment must allege the existence of one of the grounds for garnishment mentioned in s. 267.02(1) (a), the amount of the plaintiff's claim against the defendant, above

all offsets, known to the plaintiff, and that plaintiff believes that the named garnishee is indebted to or has property in his possession or under his control belonging to the defendant (naming him) and that such indebtedness or property is, to the best of plaintiff's knowledge and belief, not exempt from execution.

(d) Wis. Stat. Sec. 267.07 (1967 Pocket Part)

(1) Except as provided in s. 267.05(4), the garnishee summons and complaint shall be served on the garnishee as required for the exercise of personal jurisdiction under ch. 262, and notice of such service in substantial conformity with sub. (4), or a copy of the garnishee summons and complaint, together with the summons in the principal action, shall be served on the principal defendant as required for the exercise of personal jurisdiction under ch. 262, not later than 10 days after service on the garnishee as provided in s. 262.06.

(e) Wis. Stat. Sec. 267.13 (1967 Pocket Part)

(1) If the answer shows a debt due to the defendant, the garnishee may pay the same or sufficient thereof to cover the claim of the plaintiff, as stated in the garnishee complaint, with interest and costs, to the clerk of the court. If prior to so doing, the plaintiff in writing requests the garnishee to pay such sum to such clerk, the garnishee shall, within 5 days after receipt of such request, pay the sum to the clerk. The clerk shall give his receipt therefor to the garnishee. Such payment shall discharge the garnishee of all liability for the amount so paid.

(2) If the debt disclosed is not due, this section shall apply when it becomes due, with like effect.

(3) If the garnishee fails to pay such sum within 5 days after receipt of such request, the plaintiff shall be entitled to judgment against the garnishee for the amount disclosed, when due, either before or after judgment in the original action and may collect the same by execution; but in case no judgment has been rendered in the principal action the execution against the garnishee shall require the sheriff to pay the money collected into court to abide the event of the principal action. Moneys paid into court shall be paid to the plaintiff when final judgment is rendered in his favor, and to the extent of satisfying the same, upon order of the court, and any balance to the party entitled thereto.

(4) If no such request is made and the garnishee does not elect to pay such sum to the clerk, the garnishee shall hold the same until order of the court. No stipulation between the plaintiff and the defendant shall be honored by the garnishee, until signed and approved by the court.

(5) If judgment is against the plaintiff such moneys shall be paid to the defendant.

(f) Wis. Stat. Sec. 267.16 (1967 Pocket Part)

(1) No trial shall be had of the garnishment action until the plaintiff has judgment in the principal action and if the defendant has judgment the garnishment action shall be dismissed with costs.

(2) The court may adjudge the recovery of any debt, the conveyance, transfer or delivery to the sheriff or any officer appointed by the judgment of any real estate or personal property disclosed or found to be liable to be applied to the plaintiff's demand; or by the judgment pass the title thereto; and may therein or by its order direct the manner of making sale and of disposing of the proceeds thereof, or of any money or other thing paid or delivered to the clerk or officer. The judgment against a garnishee shall discharge him from all demands by the defendant for all property paid, delivered or accounted for by the garnishee, by force of such judgment.

(g) Wis. Stat. Sec. 267.18 (1967 Pocket Part)

(1) From the time of the service of the summons and complaint upon the garnishee he shall stand liable to the plaintiff for the property then in his possession or under his control belonging to the defendant or in which he is interested to the extent of his right or interest therein and for all his debts due or to become due to the defendant, except such as are exempt from execution, but not in excess of the amount of the plaintiff's claims as disclosed by his garnishee complaint together with 25 per cent of the amount claimed in the garnishee complaint but not less than $25 nor more than $500 to secure costs.

(2) (a) When wages or salary are the subject of garnishment action, the garnishee shall pay over to the principal defendant on the date when such wages or salary would normally be

payable a subsistence allowance, out of the wages or salary then owing, in the sum of $25 in the case of an individual without dependents or $40 in the case of an individual with dependents; but in no event in excess of 50 per cent of the wages or salary owing. Said subsistence allowance shall be applied to the first wages or salary earned in the period subject to said garnishment action.

(b) If the court determines that the principal defendant is entitled to an exemption in excess of the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be set off and applied against said exemption. If the court determines that the principal defendant is entitled to an exemption less than the subsistence allowance paid over or to be paid over pursuant to this subsection, such subsistence allowance shall be the exemption to which the principal defendant is entitled in such garnishment action.

(h) Wis. Stat. 267.20 (1967 Pocket Part)

Except upon the order of a judge no action shall be commenced by the defendant or his assignee against a garnishee upon any garnished claim or demand or to recover any property garnished, or execution be issued upon a judgment in favor of defendant against such garnishee, until the termination of the garnishment; and if an action has been commenced or an execution issued it shall be stayed by the court or a judge thereof as to the garnishee upon his application.

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